No. 78-1284

Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1978

BUB DAVIS PACKING CO., INC., PETITIONER

VS

UNITED STATES OF AMERICA, RESPONDENT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY MEMORANDUM FOR PETITIONER

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TO THE HONORABLE COURT:

The Solicitor General says:

> (The Trial Court) ". . . found . . . that . . . Cotton, an agent from the Department . . . entered Petitioner's plant in an undercover capacity . . . While inside, Cotton saw a dead cow being taken into the plant for processing."

Cotton also testified (see P. 11 et seq., COTTON'S deposition—cf., Petitioner's Brief, Appendix 2a, Item j.) that he had no knowledge of how to tell whether beef was injured, harmed, alive or dead.

Further, the Solicitor General says:

> (That Flores) ". . . an informant for the government identified another dead cow that had been brought into the plant that same day."

And,

> "Based on these observations, government inspectors . . . requested that plant operations cease . . ."

First off, Flores wasn't just an "informant"; he was a governmental employee under the Federal Tort Claim Act, and both COTTON and FLORES testified that they had found the dead cow (which Cotton and Flores said they saw being taken into Petitioner's plant) and introduced it into the Petitioner's plant. See SF 191-195; see also COTTON'S deposition p. 61 and 105; and FLORES' deposition, p. 47.

And you may search the record from top to toe and find no place where the government inspector "requested" the closure of the plant. It was done by withdrawal of inspection pursuant to 21 USC 671 and 9 CFR 305.5.

The Solicitor General's position, unfortunately, is that taken all along by the Government in this case—namely, that someone else did something or that the Petitioner acquiesced in what happened—*neither of which positions is true.*

COTTON and FLORES, who was clearly a governmental employee under the Federal Tort Claim Act, found or killed a downed cow and introduced it into Petitioner's plant for the purpose of processing the same for human consumption; and it was upon this ruse that inspection was withdrawn and Petitioner's plant closed—AND UPON NO OTHER REASON!

Misrepresentations by the Government should not be permitted to defeat liability of the U.S.A. for the deliberate wrongful acts of the USDA agents and their employees.

The Solicitor General says that Petitioner:

> ". . . points to nothing in the record to support (the) implication of misconduct . . ."

This is not true as the above will attest, as well as the trial briefs filed herein, and the brief filed with the Fifth Circuit.* Rather than use this ad hominum argument, he should confess the error of the USDA agents and their employee (FLORES) and request with us that Petitioner be made whole due to the harm done by such agents without even a minimum regard for the rights or for the property of others.

And in this regard, it should be further noted that the Trial Court, the Fifth Circuit, the United States Attorney, and the Solicitor General have nothing to say about the *HATAHLEY* case, 351 US 173 (1955), which is dispositive of this matter.

Accordingly, the prayer of the Application is renewed.

RESPECTFULLY SUBMITTED,

April 1979

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* Apparently the Solicitor General would have this Court hold that since the lower courts' "found" such things as he misrepresents in his MEMORANDUM, then no error obtains. Such a view is "gamesmanship" at its worst; see CONLEY 355 US 41; HOUGHAM 364 US 310; FOMAN 371 US 178; ZENITH RADIO 401 US 321; MAYOR OF PHILADELPHIA 415 US 605; PROCTER & GAMBLE 356 US 677 and HICKMAN 329 US 495. Cf. - in criminal law - WILLIAMS 399 US 78 and Brennan: THE CRIMINAL PROSECUTION: SPORTING EVENT OR QUEST FOR TRUTH? 1963 Wash. U. L. Q. 279.